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No. 83-

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

HERMAN G. MARTIN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT

OF CALIFORNIA

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QUESTIONS PRESENTED

1. Does the failure of the prosecution to disclose to the defense promises of lenient treatment to crucial prosecution witnesses in exchange for their testimony compel reversal of the judgment of conviction against the defendant?

2. Is the defendant's Sixth Amendment right to compulsory process of witnesses violated where material defense witnesses assert their privileges against self-incrimination as a direct result of threats made against them by prosecutorial authorities that they themselves will be prosecuted should they testify on behalf of the defense?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
A. Proceedings in the State Court	5
B. Statement of Facts	10
ARGUMENT	
I. THE CALIFORNIA SUPREME COURT INCORRECTLY REFUSED TO GRANT PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF THE UNDISPUTED FAILURE OF THE PROSECUTOR IN THIS CASE TO DISCLOSE TO THE DEFENSE MATERIAL EVIDENCE RELATING TO THE CREDIBILITY OF KEY PROSECUTION WITNESSES	29

II. REPEATED ACTS OF WITNESS INTIMIDATION PERPETRATED BY THE PROSECUTOR IN THE COURSE OF HIS PROSECUTION OF PETITIONER, DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW; THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO GRANT RELIEF ON THIS GROUND DEMANDS REVIEW BY THIS COURT 41

CONCLUSION 56

TABLE OF AUTHORITIES

	Page
Brady v. Maryland 373 U.S. at 87	35,36, 39,40,48
Bryant v. Zimmerman (1928) 278 U.S. 63	2
Freeman v. State of Georgia (5th Cir. 1979) 599 F.2d 65	49,50
Giglio v. United States (1971) 405 U.S. 150, 153	35,36,37 38,39,40 48,55,56
Griffin v. California (1965) 380 U.S. 609	26,27
Mooney v. Holohan 294 U.S. 103, 112 (1935)	35
Napue v. Illinois 360 U.S. 264 (1959)	35,36
Pyle v. Kansas 317 U.S. 213 (1942)	35
Smith v. Phillips (1981) 455 U.S. 209, 219	34
United States v. Agurs (1976) 427 U.S. 97	34
United States v. Hammond (5th Cir. 1979) 598 F.2d	

1008, 1013 55

United States v. McDonald (5th Cir. 1980) 620 F.2d 559, 564 55

United States v. Morrison (3rd Cir. 1976) 535 F.2d 223 52,53

United States v. Smith (D.C. Cir 1973) 478 F.2d 976, 979 51

United States v. Valenzuela-Bernal (1981) 458 U.S. 858 48,49,50, 54,56

Webb v.Texas (1972) 409 U.S. 91 55,56

STATUTES, CODES AND OTHER AUTHORITIES

California Penal Code

Section 182 5
Section 182.1 5
Section 187 5
Section 240 5
Section 518 5
Section 12022(a) 5

California Rules of Court

Rule 24(a) 3

28 United States Code

Section 1257(3) 3

United States Constitution

Amendment V 3,44,46,5
Amendment VI 3,53
Amendment XIV 3

California Constitution

Article VI 2

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OPINION BELOW

The order of the Supreme Court of California denying petitioner's original petition for writ of habeas corpus {Crim. 23573} appears as Appendix "A" of this petition. No formal opinion was rendered by that Court.

JURISDICTION

Petitioner respectfully prays that a Writ of Certiorari issue to review the denial by the Supreme Court of California of his original petition for writ of habeas corpus in the case numbered Crim. 23573. Said petition was filed in that court on March 6, 1984 pursuant to that Court's original jurisdiction in habeas corpus matters (Article VI, Section 10, Constitution of California). Said petition was denied by the Court on April 19, 1984 and became final on that date (Rule 24(a), California Rules of Court. See also, Bryant v. Zimmerman (1928) 278 U.S. 63) Two justices of the California Supreme Court voted to grant the petition. (Appendix "A")

This Court's jurisdiction is invoked under 28 United States Code Sections 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person... shall be... deprived of life, liberty, or property without due process of law..."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right... to have compulsory process for obtaining witnesses in his favor..."

United States Constitution. Amendment XIV:

"...nor shall any state deprive any person of life, liberty, or property without due process of law..."

STATEMENT OF THE CASE

A. Proceedings in the State Court

Petitioner was convicted by a jury in the Superior Court of the State of California, in and for the County of San Diego, of the offenses of murder in the second degree (California Penal Code Section 187), conspiracy to commit extortion (California Penal Code Sections 518 and 182.1), conspiracy to commit assault with a deadly weapon (California Penal Code Sections 245(a) and 182.1) and simple assault, a misdemeanor (California Penal Code Section 240). As to the three felony counts, a principal was found to have been armed with a firearm (California Penal Code Section 12022(a)). (CT 308-309).

Upon conviction, petitioner moved the Court for a new trial and for modification of the verdict. These motions were denied. As to the murder count, petitioner was sentenced to a term of 15 years to life in state prison. The Court also imposed a one-year enhancement for the firearm allegation, to run consecutive to the 15 to life term (CT 266, 312).

As to each of the two counts of conspiracy, petitioner was sentenced to three years in state prison and received a one-year enhancement for the firearm allegation. These terms were ordered stayed by the trial court. As to the misdemeanor count, petitioner was sentenced to six months in the County Jail, such sentence to run concurrent to the term imposed as to the murder count (CT 312).

On March 6, 1984, petitioner filed in the California Supreme Court an original petition for writ of habeas corpus, alleging that petitioner had been deprived of due process of law by virtue of suppression of material evidence by the prosecution. The petition also demanded that petitioner be granted a new trial in view of the discovery of new credible evidence not previously available to the defense. {California Supreme Court case number Crim. 23573}. The petition was filed pursuant to that court's original jurisdiction in habeas corpus matters.

Said petition was based upon the records and documents from the trial court on file with the Court of Appeal, Fourth Appellate District, in People v. Martin/In re Martin on Habeas Corpus {1983} 150 CA.3d 148, as well as

the exhibits and documents attached to petition 23573. Among the exhibits attached to the petition and cited in support of such petition was the two to one published opinion of the Court of Appeal affirming petitioner's conviction in the above case of People v. Martin/In re Martin {Exhibit "Y" attached to the petition in case 23573}. Review of this Court of Appeal opinion is not sought in the instant petition. The Court of Appeal's opinion arose by way of direct appeal filed on behalf of petitioner {4 Crim. 13945} and a subsequent original petition for writ of habeas corpus {4 Crim. 15681} filed on September 6, 1983. The appeal in 4 Crim. 13945 and the petition for writ of habeas corpus {4 Crim. 15681} were consolidated by the Court of Appeal and on December 23, 1983 the judgment of conviction was

affirmed in the above-described two-to-one published opinion. In the same opinion, the petition for writ of habeas corpus was denied.

In the original petition for writ of habeas corpus filed on March 6, 1984 in the Supreme Court of California in Crim. 23573 petitioner asserted that his rights under the United States Consitution to due process of law and a fair trial were denied by the failure of the prosecutor to disclose inducements offered to key prosecution witnesses in exchange for their testimony, and by the intimidation of material defense witnesses by the prosecution which resulted in such witnesses refusing to testify at trial. The petition in Crim. 23573 included the same documentary evidence as was before the Court of Appeal in 4

Crim. 15681; however, supplemental juror affidavits, as well as the opinion of the Court of Appeal in 4 Crim. 13945/15681, were also supplied to the Supreme Court of California in case Crim. 23573. This petition was denied by the Supreme Court of California on April 19, 1984, although two justices voted to grant the petition {Appendix "A"}.

It is the denial of the petition for writ of habeas corpus by the Supreme Court of California in Crim. 23573 on April 19, 1984, to which the instant petition for writ of certiorari is directed.

B. Statement of Facts

The following factual summary is taken from the trial record, which was incorporated by reference in the

petition filed with the Supreme Court of California in Crim. 23573 and the exhibits filed with that Court in support of the petition, which exhibits included that published opinion of the Court of Appeal in People v. Martin/In re Martin on Habeas Corpus, (1983) 150 CA.3d 148.

The record reveals that the victim in this case, Richard Crake, a San Diego area attorney, was murdered by one Andrew James Powell, on or about May 12, 1981 (RT 1003-1005).

Petitioner herein was tried and convicted on a theory of vicarious liability, i.e., conspiracy, there being no indication at trial that petitioner's alleged acts were done with any subjective intent to kill on his part. Accordingly, the People's case below was predicated almost

entirely on the testimony of alleged conspirator Powell, which the Court of Appeal deemed to be "pivotal" {Opinion of the Court of Appeal, Exhibit "Y" attached to the petition for writ of habeas corpus in case no. Crim. 23573, p. 26}.

Powell, who had previously pled guilty to the murder of Crake, testified at trial that beginning March 23, 1981, he worked for petitioner at Anear Insurance Company performing general office duties {RT 945-946}.

Petitioner, a former captain in the United States Army, had founded Anear Insurance Company in 1975 after having voluntarily and successfully worked for the Department of Justice to obtain convictions of members of organized crime. Petitioner, who at the time of trial was 62 years old and in poor

health, was given a new identity by the United States government following the completion of these operations. The United States Government thereafter moved petitioner, his wife and family to the San Diego area out of fear for the safety of petitioner and his family {CT 231-232; RT 1845-1846}.

At trial, San Diego attorney Donald F. McClean, Jr. testified as to litigation between petitioner and one George Frieh. During the pendency of this litigation appellant was deposed by Richard Crake. During the deposition, petitioner, on the advice of counsel, refused to answer certain questions concerning his {petitioner's} background due to the nature of his previous activities with the Department of Justice and out of fear for his family's safety. {RT 1804, 1845-1846}.

Over petitioner's objection, evidence was admitted at trial that petitioner had stated to Robert Noel, a United States Attorney, that if ordered to answer certain questions about his work with the Department of Justice, he {petitioner} would commit perjury rather than reveal details about his background that might endanger himself or his family {RT 1789-1790}.

Andrew Powell's testimony, in substance, was to the effect that petitioner sent Powell to see Crake and tell Crake that Petitioner wanted the money owed him {$100,000}. According to Powell, Powell and one Kathleen Piascik {aka "Cass"} thereafter visited Crake although Powell testified at trial that he did not know why he visited Crake {RT 1154}. Powell stated that in the course of this visit Crake "went into a

rage". A struggle ensued between Crake and Powell. Powell testified that Crake fell and pulled Powell on top of him. In the course of the struggle, Powell struck Crake with a gun allegedly provided by petitioner RT 1003-1005).

Powell testified as to two meetings he claimed to have had with petitioner on May 11, 1981, the day before the Crake homicide. Powell stated that at 8:30 or 9:00 a.m. that morning petitioner provided him with Crake's address. Later that morning following a second meeting with Petitioner, Powell claimed that he obtained the weapon subsequently taken by him to Crake's residence, from petitioner's vehicle. (RT 981-983, 1047-1048).

James Harris Murphy, who was employed as a Deputy United States

Marshall during May of 1981, and was also acquainted with petitioner, testified that he was telephoned by petitioner on the morning or afternoon of May 11 {RT 1742}. Petitioner asked Murphy to obtain an address and telephone number for Richard Crake because petitioner had papers to serve on Crake in connection with a pending lawsuit {RT 1743}. About six months earlier petitioner had called Murphy and asked him to verify an address for Crake {RT 1744}.

Murphy forwarded the request to the fugitive detail of the Marshall's office, but did not receive the information requested until 3:30 p.m., at which time he forwarded the information to petitioner. {RT 1744-1746}. This was six to seven hours after Powell alleged he received the

address from petitioner.

The morning after the Crake homicide, while driving to work, Powell was arrested. {RT 1014}. Powell admitted at trial that he lied to police officers when he indicated to them that he had no involvement in Crake's death {RT 1014}.

The record reveals, through the testimony of Powell's girlfriend, Michelle Goff, and other acquaintances of Powell, i.e., Mark Adelman, president of Universal Consumer Benefit Associates; Lowell English, a retired Marine Corps Major General; and Madelaine Payton, Powell's ex-wife, that Powell's reputation for truth and veracity was poor {RT 1999-2000, 2071, 2103}. However, the defense was not permitted to offer evidence relating to past statements of Powell tending to

show that he was a pathological liar {RT 1035}, such as testimony that Powell told Michelle Goff that he played professional football for the Buffalo Bills for ten years and that he played cornerback, and that he also played in Philadelphia and Baltimore; that he told Goff that he was having trouble collecting his retirement money from the he National Football League {PHT 55, 168}; and that he also apparently lied at the preliminary hearing as to where he went to college {PHT 54, 363}.

Steve Aguilar, also called as a witness on behalf of petitioner, testified that he met Andrew Powell in 1979 or 1980, when they both were employed by Harrison Buick {RT 1901}. In March of 1981, Powell called Aguilar and asked him if he would like to make

a thousand dollars. On May 11, 1981, Powell again called Aguilar and again asked if Aguilar would like to make a thousand dollars (RT 1901-1902). Powell, during this conversation, also asked Aguilar if Aguilar could obtain an "unmarked gun" for Powell (RT 1903).

That same day, at 1:00 or 1:30 p.m., Powell came to Harrison Buick driving a large Cadillac. Powell picked up Aguilar and they drove to Aguilar's apartment complex, where Aguilar obtained a gun, a loaded .357 Magnum, from one Charles Riley, who lived in Aguilar's complex. (RT 1903-1905; 1930, 1938).

The following day, Aguilar learned that there was "a murder. . . in La Jolla" and that Powell had been arrested. Aguilar held the gun for a week, strongly suspecting that the

weapon was used by Powell in the murder; he then disposed of the gun in a dumpster because he was "too frightened to even think" {RT 1951-1952}.

Following his testimony at trial, Steven Aguilar was placed under arrest while leaving the courtroom in front of other defense witnesses.

San Diego County Superior Court records reveal no charges ever being filed against Aguilar in connection with this arrest. Aguilar was released on his own recognizance the day following his arrest, and the Court reprimanded the District Attorney on the record for the arrest of Aguilar. {RT 1995-1996} Subsequently, several defense witnesses refused to testify, and asserted their privileges against self-incrimination. {RT 2050-2060; CT

300-301}.

Exhibits lodged with the trial court and the Court of Appeal indicated that one of these witnesses, Charles Riley, would have corroborated the testimony of Steven Aguilar regarding where Powell obtained the murder weapon; and that two other witnesses who refused to testify at trial, John Gross and Eugene Wallace, who were acquainted with Powell, would have testified that Powell fabricated his story implicating appellant in the Richard Crake homicide. Trial counsel, citing these court's exhibits requested at trial that these witnesses be granted immunity by the trial court, after the District Attorney refused to grant such immunity {RT 2052}, but this request was denied {RT 2055-2056}.

Exhibits filed with the Court of

Appeal and the California Supreme Court indicate that Mr. Riley and Mr. Wallace refused to testify on petitioner's behalf at petitioner's trial because they had been threatened with prosecution by agents of the San Diego County District Attorney's office and had read, prior to their proposed testimony, newspaper accounts of the arrest of Steven Aguilar {Exhibits A, F and I, in case nos. 4 Crim. 15681 and Crim. 23573}.

Steven Jarrett, an inmate at the county jail who had suffered felony convictions for prior theft-related offenses {RT 1869}, testified on behalf of the prosecution. Between September 17, 1981 and November of 1981, Jarrett was a trustee at the county jail. At some point during that time period, Jarrett had a conversation with

petitioner. Jarrett asked petitioner why petitioner was in jail, "if the other guy was the one that committed the murder" {RT 1870-1971}. Petitioner supposedly made a statement to the effect that there were two black inmates in jail who were Powell's friends, and that the matter could be cleared up if they would testify that they gave Powell the gun; and further, that if they so testified, petitioner would give them both $5,000 and bail them out {RT 1872-1873}. Jarrett was not asked at trial if appellant indicated why he felt it would be necessary to give these inmates $5,000. However, the District Attorney, over defense objection was specifically allowed by the trial court, during closing argument, to raise the inference that petitioner unsuccessfully attempted to bribe these

two inmates {RT 2210.}

In the course of his testimony, Jarrett was asked if any promises of leniency or favorable treatment had been given him by the prosecution, and he replied "none". However, Court records on file with the Court of Appeal and Californis Supreme Court, as well as Jarrett's statement, indicate that such promises were made to Jarrett in connection with his own pending criminal matters, specifically in exchange for his testimony against petitioner {Exhibits L, M, N, W attached to petition 23573; See also, opinion of the Court of Appeal, Exhibit "Y", case 23573, page 26}.

Similarly, in the case of Andrew Powell, the chief prosecution witness, exhibits were presented to both the Court of Appeal and to the California

Supreme Court demonstrating that Powell had received promises of favorable treatment in connection with his custodial status and institutional classification in exchange for his testimony against petitioner {Exhibits P, Q, R, S, T and U; Exhibit "Y", pages 24-26 all attached to the petition in case no. Crim. 23573}. However, Powell at trial denied that any inducements had been offered to him in exchange for his testimony {RT 1032}.

Neither the prosecutor's arrangement with Jarrett nor his arrangement with Powell was disclosed to petitioner's defense counsel prior to or during trial {Exhibits O, V in Crim. 23573}. In the course of closing argument, the prosecutor argued that there was no evidence that he [Powell] had been given any kind of deal for his

testimony. {Opinion of the Court of Appeal, Exhibit "Y" in case 23573, page 26}.

Also in the course of his closing argument, the prosecutor invited the jury to speculate if it would find petitioner guilty "if neither [petitioner nor Powell] testified" {RT 2300-2301}.

Petitioner, who did not testify at trial, moved through his counsel, for a mistrial pursuant to this Court's opinion in Griffin v. California {1965} 380 U.S. 609, noting that the prosecutor's comments "was a direct comment on my client's failure to testify" {RT 2301-2302}. This motion was denied by the trial court {2302}. Thereafter, the prosecutor, in describing Powell's alleged activities, asked the jury "Is there any other

explanation for what Powell did?" (RT 2303).

Petitioner's contention on his direct appeal that the prosecutor's comments constituted prejudicial Griffin error, particularly in view of the prior testimony that petitioner had allegedly indicated that he would commit perjury out of fear for his family's safety in connection with a deposition taken in a civil lawsuit rather than reveal his work with the Department of Justice, (RT 1804), was rejected by the Court of Appeal (Exhibit "Y" in case Crim. 23573, page 19).

Because the fact of inducements offered to key prosecution witnesses was not disclosed to the defense at trial (Exhibits O, V) this issue was necessarily raised in the first

instance by way of an original petition for writ of habeas corpus. Similarly, because the investigation and documentation of prosecutorial misconduct in this case on petitioner's behalf extended well beyond the conclusion of petitioner's trial {See, e.g., exhbits A-K; O,R, V-Z, this issue was likewise of necessity raised in the first instance by way of habeas corpus, as the necessary documentation of petitioner'`s claims was beyond the scope of the trial record.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT INCORRECTLY REFUSED TO GRANT PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS ON GROUNDS OF THE UNDISPUTED FAILURE OF THE PROSECUTOR IN THIS CASE TO DISCLOSE TO THE DEFENSE MATERIAL EVIDENCE RELATING TO THE CREDIBILITY OF KEY PROSECUTION WITNESSES

Petitioner, in his Petition for Writ of Habeas Corpus filed with the California Supreme Court, documents the fact that inducements were offered to key prosecution witnesses, Andrew Powell and Steven Jarrett in exchange for their testimony at petitioner's trial (petition for writ of habeas corpus filed in, Crim. 23573, pages 37-38). These inducements were not disclosed to the defense (see, exhibits

"O", "V", lodged with the petition for writ of habeas corpus in Crim. 23573}. Juror affidavits submitted to the California Supreme Court {Exhibit "Z" demonstrated that had such inducements been disclosed, the jury's verdict would have been altered.

In the case of Powell, the material inducement, among others, was a promise that the District Attorney would intercede on Powell's behalf for purposes of allowing him to obtain favorable treatment in institution selection within the California Department of Corrections once he was committed to state prison for second degree murder. {See also, Exhibits "D", "E", "P", "Q" and "U", attached to the California Supreme Court petition}.

In the case of Steven Jarrett, the

inducement was that the District Attorney would intervene on his behalf for the purpose of allowing Jarrett to obtain more favorable treatment at judgment and sentencing in his pending criminal case (Exhibit "W" attached to the California Supreme Court petition).

Jarrett's cooperation at petitioner's trial was in fact brought to the attention of the sentencing court in Jarrett's case, and the court in fact considered such cooperation in sentencing him to a total aggregate term of five years in state prison for the crimes for which he had entered pleas of guilty (Exhibit "L", "M", and "N"), as opposed to twelve years for his co-defendant.

Petitioner brought to the attention of the California Supreme

Court the fact that both witnesses at trial said that no promises for lenient treatment had been made to them in exchange for their testimony, and that the statements of the witnesses were not corrected by the District Attorney at trial {RT 1032, 1874}.

The published decision of the Court of Appeal, Fourth Appellate District {4 Crim. 13945/15681; 150 Cal.App.3d 148} was provided to the California Supreme Court as an exhibit in connection with Crim 23573. {Exhibit "Y"}.

Therein, the validity of the claims by petitioner that substantial material evidence had in fact been suppressed by the prosecution was neither questioned nor disputed by the Court of Appeal, who had access to the exhibits hereinabove cited. Indeed,

the Court of Appeal acknowledged that "the prosecution's failure [to disclose inducements made to defense witnesses] resulted in the suppression of substantial material evidence concerning the credibility of chief witnesses." {Emphasis Added; Page 27 of the Court's opinion; Exhibit "Y" before the California Supreme Court}. The Court of Appeal also acknowledged that Powell and Jarrett "denied promises of lenient treatment had been made to them in exchange for their testimony. The District Attorney sat by as this misleading testimony entered the record and in the case of Powell argued: `there is no evidence that he was given any kind of deal for his testimony'... aside from the exhibits accompanying the petition for habeas corpus it appears in the record this conduct was more than an oversight and

beyond benign neglect." (Opinion, page 26, emphasis added)

Nonetheless, the Supreme Court, when presented with the identical allegation which was previously before the Court of Appeal, summarily denied petitioner's claim, although two justices voted to grant the petition for writ of habeas corpus. (Appendix "A") Such denial not only perpetuated the denial of due process memorialized by the Court of Appeal in its published decision, but is inconsistent with numerous prior decision of this Court.

Clearly, a prosecutor must disclose evidence which would create a reasonable doubt of guilt that did not otherwise exist. See, this Court's opinion in Smith v. Phillips (1981) 455 U.S. 209, 219, citing United States v. Agurs (1976) 427 U.S. 97.

In Giglio v. United States (1971) 405 U.S. 150, 153 this Court summarized and reaffirmed the principles that the prosecutor must not only disclose to the defense substantial material evidence, but also is under a duty to correct false or misleading testimony which enters the record at trial:

> "As long ago as Mooney v. Holohan 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a Court and jurors by presentation of known false evidence is incompatible with 'rudimentary demands of justice'. This was reaffirmed in Pyle v. Kansas 317 U.S. 213 (1942). In Napue v. Illinois 360 U.S. 264 (1959), we said, '[t]he same result obtains when the state, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id., at 269. Thereafter, Brady v. Maryland 373 U.S. at 87 held that suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of

> the prosecution.' [citation omitted]. When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule. Napue v. Illinois supra, at 269.... A finding of materiality of the evidence is required under Brady, supra, at 87. A new trial is required if 'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury... 'Napue v. Illinois supra, at 271."

The facts of Giglio, supra, are indistinguishable from the undisputed facts in this case. In Giglio, supra, the key witness against defendant was one Robert Taliento, the defendant's alleged co-conspirator in the offense charged and the only witness linking the defendant with the crime. Notwithstanding a promise having been made by the prosecution that Taliento would not be prosecuted in exchange for his testimony, Taliento testified at

trial, upon cross-examination by the defendant's defense attorney, that he believed that he could still be prosecuted notwithstanding his testimony against the defendant (Giglio, at pages 151-152). In summation, the prosecutor stated that Taliento "received no promises that he would not be indicted." (Giglio, at page 152.)

This Court reversed the judgment of conviction and remanded the cause noting that "Here the government's case depended almost entirely on Taliento's testimony; without it there would have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution

would be relevant to his credibility and the jury was entitled to know of it." (Giglio v. United States, supra, at pages 154-155, emphasis added)

In the instant case, as indicated in the documents before the California Supreme Court and as has previously been indicated to this court, inducements were made to key prosecution witnesses which were not disclosed by the prosecutor, which were denied by the witnesses in question at trial, which were not brought to the attention of the court and jury after the misleading testimony of the prosecution witnesses entered the record, and which in the case of Andrew Powell, were denied by the prosecutor in a misleading fashion in the course of summation (Exhibit "Y" attached to the California Supreme Court petition,

pages 24 to 27; see also, RT 2219}. Moreover, "Although Jarrett's testimony was important, Powell's testimony as a co-conspirator was pivotal." {Exhibit "Y" Opinion of the Court of Appeal attached to the California Supreme Court petition, page 26}. Apparently, at least three of the jurors, including the jury foreman, who heard petitioner's case agreed with this evaluation {Exhibit "Z" in case Crim. 23573}.

Clearly, the documentation presented to the California Supreme Court, on its face, demonstrated that "suppression of material evidence [which] justifies a new trial" occurred in the present case. Giglio v. United States, supra at page 153; Brady v. Maryland, supra at page 87.

Under the foregoing circumstances,

a writ of certiorari must be issued so that the principals of Brady and Giglio, ignored in this case, may be reaffirmed; and to review the denial of petitioner's petition for writ of habeas corpus by the California Supreme Court; and to preserve petitioner's right to due process of law under the Fifth Amendment to the United States Constitution.

II. REPEATED ACTS OF WITNESS INTIMIDATION PERPETRATED BY THE PROSECUTOR IN THE COURSE OF HIS PROSECUTION OF PETITIONER, DEPRIVED PETITIONER OF A FAIR TRIAL AND DUE PROCESS OF LAW; THE REFUSAL OF THE CALIFORNIA SUPREME COURT TO GRANT RELIEF ON THIS GROUND DEMANDS REVIEW BY THIS COURT

Exhibits lodged by petitioner in connection with his petition for writ of habeas corpus in Crim. 23573 document a continuous and blatantly prejudicial pattern of intimidation of defense witnesses carried out by the San Diego County District Attorney's office, which effectively rendered material witnesses unavailable to petitioner at trial and therefore deprived petitioner of due process of law. Defense witnesses' and potential defense witnesses were subjected to threats, express and implied, of

prosecution for "crimes" purportedly relating not only to the witnesses' proposed testimony, but also to matters totally unrelated to petitioner's case (Exhibits "A", "B", "C", "F", and "I", attached to the petitioner for writ of habeas corpus in Crim. 23573). In effect, witnesses were induced to exercise their privileges against self-incrimination not just on the basis of the incriminatory effect their testimony allegedly would have had, but on the basis of the prospect of selective prosecution, i.e., the possibility that were the witnesses to testify, they would be subjected to prosecution for the purported "crimes" which would otherwise be ignored by the District Attorney's office.

Probably the most blatant manifestation of prosecutor misconduct

appeared on March 8, 1982 and the days immediately following, in the arrest of Steven Aguilar outside the courtroom following his testimony. As has been indicated herein, Aguilar was arrested in full view of, and a few feet away from, two scheduled defense witnesses, as well as in front of representatives of the local press (Exhibits "A" through "D", case no. Crim. 23573). There can be little question that the Aguilar incident was perpetrated by the District Attorney's office in bad faith and for purposes of witness intimidation, as opposed to proper law enforcement motives. Aguilar was released on his own recognizance upon the recommendation of the Deputy District Attorney handling petitioner's case, within a day of his arrest (RT 1995-1996). Court records do not indicate that as a result of this

arrest he was charged with any crime. However, the event received extensive media coverage and caused Mr. Aguilar to lose his job {Exhibits "A", "E"}. This latter aspect of the Aguilar incident was specifically brought to the attention of defense witness Charles Riley by representatives of the San Diego County District Attorney's Office {Exhibits "A", "E" and "F"}. On the morning following the Aguilar incident, when Riley was scheduled to testify as a defense witness, Riley's memory was refreshed regarding the previous day's events and he was informed by the District Attorney's office that the same fate awaited him were he to take the stand and offer substantive testimony in petitioner's case. He thereupon took the stand and asserted his Fifth Amendment privilege against self-incrimination {Exhibits

"D", "F"; CT 300}.

Similarly, Eugene Wallace, who according to documentation provided by petitioner to the California Supreme Court {Exhibit "I",} had advised the San Diego County District Attorney's office that Andrew Powell had received the weapon used by Powell to kill the victim from Steven Aguilar, and who had also advised the District Attorney of a scheme by Powell to fabricate a story to the effect that petitioner, and not Aguilar, had supplied the weapon {Exhibit "I"; CT 301}, was informed by the District Attorney in September of 1981 that were he to so testify at petitioner's upcoming trial, he {Wallace} would be prosecuted as a "habitual criminal." Wallace, who prior to his proposed testimony at petitioner's trial had read newspaper

accounts of the arrest of Steven Aguilar, refused to testify at trial, and instead asserted his Fifth Amendment privilege against self-incrimination {Exhibit I; CT 301}. Wallace was never charged with being a "habitual criminal" {Exhibit "I"}.

Based upon the foregoing, there can be no question that material defense witnesses were made unavailable as a direct result of state action. Nor can there be any doubt that the misconduct of the district attorney's office was prejudicial in nature. The conduct of the prosecution, and subsequent media coverage, materially affected the decisions of Charles Riley and Eugene Wallace to asset their privileges against self-incrimination {Exhibits "F" and "I" attached to the petition in Crim. 23573}, thereby

effectively rendering these witnesses unavailable to the defense. The testimony that was not presented would have tended to corroborate Steven Aguilar's testimony to the effect that Andrew Powell received the murder weapon not from petitioner, but from Aguilar (Exhibits "F" and "I"). Also precluded was any opportunity on the part of the defense to demonstrate, through the testimony of Eugene Wallace, that Powell's testimony implicating petitioner in the Crake homicide was fabricated.

Clearly, similar principles apply to the situation outlined above as apply in the situation wherein the prosecutor fails to disclose inducements offered to material prosecution witnesses in exchange for their testimony. See, (subheading

number I, supra, and this Court's opinion in Giglio v. United States, supra, 405 U.S. 150 at 153 citing Brady v. Maryland, supra, 73 U.S. at 87 and other authorities cited therein). The witness intimidation which occurred in the instant case, of course, contains the additional element of "bad faith" on the part of the prosecution. Petitioner is mindful that this court, in United States v. Valenzuela-Bernal (1981) 458 U.S. 858, has recently reiterated the principles that in situations where as here, the prosecutor has acted to suppress material evidence, the material issue before the court is not the good or bad faith of the prosecution but whether the evidence suppressed is material to either guilt or punishment (at page 868 citing Brady v. Maryland, supra at page 87).

This court noted however, in Valenzuela-Bernal, that under the facts before it, which involved the deportation of alien witnesses, "no onus, in the sense of `hiding out' or `concealing' witnesses, attached to the government by reasons of its discharge of the obligations imposed upon it by Congress; its exercise of these manifold responsibilities is not to be judged by the standards by which might be appropriate if the government's only responsibility were to prosecute criminal offenses." At pages 865-866. Compare Freeman v. State of Georgia {5th Cir. 1979} 599 F.2d 65, {police detective concealed the location of witnesses.}

This court observed that "the responsibility of the Executive Branch to faithfully execute the immigration

policy adopted by Congress justifies the prompt deportation of illegal-alien witnesses upon the Executive's good-faith determination that they possess no evidence favorable to the defendant in a criminal prosecution." {Valenzuela-Bernal at page 872, emphasis added}.

The above language, particularly this court's citation to Freeman at page 866, suggests that the bad faith of the prosecutor may at least be a factor in determining whether the suppression of evidence is in fact traceable to prosecutorial conduct. For example, materials provided to the California Supreme Court, while containing documentation for the fact that material defense witnesses were intimidated by the prosecutor into exercising their privileges against

self-incrimination, also contains the conclusion from the Court of Appeal, which was privy to same information which was provided to the California Supreme Court, that "a potential witness' assertion of the Fifth Amendment privilege against self-incrimination is not conduct attributable to the prosecutor." (Exhibit "Y" in the petition for writ of habeas corpus in Crim 23573, page 24). Yet, in United States v. Smith (D.C. Cir. 1973) 478 F.2d 976, 979 the court was faced with the situation in which the prosecutor warned a defense witness that should such witness testify, he would face prosecution. The court observed:

> "we think the prosecutor's warning was plainly a threat that resulted in depriving the defendants of [a witness']

> testimony... even if the prosecutor's motive was impeccable, however, the implication of what he said was calculated to transform [the witness] from a willing witness to one who would refuse to testify and that in fact was the result."

In United States v. Morrison, (3rd Cir. 1976) 535 F.2d 223, prejudicial error was found where a prosecutor confronted a witness outside the court and threatened that witness with prosecution if she incriminated herself in anyway. The witness subsequently refused to answer a number of questions and the defendant was thereafter convicted. The court in Morrison reversed holding that the defendant was denied a fair trial and that he was deprived of his constitutional right to call witnesses in his defense by the actions of the prosecutor.

Petitioner would submit that the present case is virtually indistinguishable from Morrison, supra in that there can be no question that petitioner was denied due process of law and deprived of his Sixth Amendment right to compulsory process of witnesses by virtue of conduct directly attributable to the prosecution. The above authorities belie the notion appearing in the record before the Supreme Court in the form of the opinion of the Court of Appeal, that the exercise of the privilege against self-incrimination is not conduct attributable to the prosecutor, at least under the circumstances of this case.

Finally, petitioner would note that there can be absolutely no question that the evidence suppressed

herein was "material". With regard to the testimony of prospective witness Eugene Wallace, his proposed testimony to the effect that Powell fabricated his testimony against petitioner was clearly critical and not cumulative to any other evidence available to the defense. Compare, this court's opinion in United States v. Valenzuela-Bernal, supra at page 873. And while Valenzuela-Bernal requires that in order for sanctions to be imposed against the prosecution for suppression of evidence, a showing must be made that the evidence is "material" and favorable to the defense "in ways not merely cumulative to the testimony of available witnesses..." at page 873, it cannot be denied that the proposed testimony of Charles Riley and Eugene Wallace, even to the extent it would have been corroborative of the

testimony of Steven Aguilar, would have been "material" within the meaning of that term as it has previously been defined by this court, since such corroboration in turn would have directly undermined the credibility of the prosecution's key witness, co-conspirator, Andrew Powell (see, Giglio v. United States, supra, at pages 154-155).

In this connection, it should be noted that error such as occurred in this case has been held to constitue reversible error per se. See, United States v. McDonald (5th Cir. 1980) 620 F.2d 559, 564; United States v. Hammond (5th Cir. 1979) 598 F.2d 1008, 1013, citing this Court's Opinion in Webb v. Texas (1972) 409 U.S. 91.

Accordingly, a writ of certiorari must issue to review the Supreme

Court's failure to grant relief in this matter in accordance with petitioner's right to due process of law and it's failure to follow the principles previously laid down by this Court. Moreover, to the extent that conflict exists between this court's concept of "materiality" of suppressed evidence, as set forth in this court's opinions in Giglio and Webb on the one hand and Valenzuela-Bernal on the other, review is necessary to insure uniformity of decision and to provide guidance to the lower courts in the future.

CONCLUSION

For the reasons hereinable cited, petitioner respectfully prays that a writ of certiorari issue.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX "A"

ORDER DENYING WRIT

OF HABEAS CORPUS

Criminal No. 23573

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
APR 19, 1984
LAURENCE P. GILL, Clerk

Deputy

In re HERMAN G. MARTIN

on Habeas Corpus.

Petition for writ of habeas corpus DENIED.

Bird, C.J. and Kause, J., are of the opinion the petition should be granted.

BIRD

Chief Justice